IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee/Cross-Appellant, v. BRAD LEE MONTGOMERY, Appellant/Cross-Appellee.	)	2 CA-CR 2005-0016 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200400137

Honorable Wallace R. Hoggatt, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, Brad Lee Montgomery was convicted of one count of kidnapping and two counts of sexual assault, all class two felonies. The jury found that the kidnapping was a dangerous nature offense. In addition, the trial court found Montgomery has two historical prior felony convictions. The court imposed presumptive, consecutive terms of imprisonment on all three counts, totaling forty-two years. Montgomery claims on appeal that the trial court erred in denying his two motions for a new trial and in ordering his sentence on the kidnapping conviction to be served "day for day." The state has filed a cross-appeal, contending Montgomery must be resentenced on the kidnapping conviction not only because the imposition of flat time was unlawful but because the trial court erroneously believed it could sentence Montgomery only as a dangerous, first-time offender when, in its discretion, it alternatively could have sentenced him as a nondangerous, repetitive offender. We affirm Montgomery's convictions but remand the case for resentencing on his conviction for kidnapping.

Facts and Procedural History

¶2 Both the victim, A., and Montgomery testified at trial that Montgomery had engaged in both oral sexual contact and sexual intercourse with A. in the men's restroom of a hotel lobby where A. had been working at the front desk. However, their versions of the events substantially differed. A.'s testimony portrayed Montgomery as a total stranger who had forced the acts by abducting her at knife point from an alcove outside the restroom. Montgomery claimed he and A. had met briefly at a shopping mall, and the subsequent

encounter at the hotel had been consensual and did not involve a knife. The jury found Montgomery guilty of kidnapping and sexual assault, but rendered a not guilty verdict on a related charge of aggravated assault with a deadly weapon or dangerous instrument.

¶3 Montgomery then filed a motion seeking either a judgment of acquittal or a new trial. He based his request for a new trial on claims that the verdict was contrary to law or to the weight of the evidence, arguing the verdicts were inconsistent and attacking A.'s credibility. He sought to bolster this claim with the fact that one juror, Cole, had sent him an apparently unsolicited letter stating, among other things, "I still don't believe the state had enough evidence, but hey, I'm just one little person." The court denied the motion.

¶4 Three months later, Montgomery filed a "Renewed Motion for a New Trial." In this motion, he alleged that another juror, Brown, had failed to disclose prior law enforcement experience during voir dire and that two other jurors, whose affidavits were attached to the renewed motion, had based their verdicts on "extrinsic" factors. Juror Cole's affidavit said he had been "one of the last 'not guilty' holdouts," but he had changed his verdict to guilty only "because [his ill] health dictated that [he] change [his] position to 'guilty,' in order to go home." Juror Ladd's affidavit stated, "'Guilty' was not my true verdict . . . . I felt intimidated by the probation officer, [juror Brown], who had belittled everything everyone else said and was very pushy. She said Montgomery had priors, and that's all that she needed to know." After a hearing, the trial court denied the motion, stating its reasoning on the record.

Motions for New Trial

¶5 On appeal, Montgomery reasserts the arguments raised in his renewed motion for a new trial. We review a trial court's denial of a motion for new trial for an abuse of discretion. *State v. Ruggiero*, 211 Ariz. 262, ¶ 6, 120 P.3d 690, 692 (App. 2005). However, as the state correctly points out, the timeliness of a motion for a new trial is jurisdictional. *See State v. Hickle*, 129 Ariz. 330, 332, 631 P.2d 112, 114 (1981) (trial court lacked jurisdiction to grant defendant's second, untimely motion for new trial). A motion for new trial must be filed "no later than 10 days after the verdict has been rendered." Ariz. R. Crim. P. 24.1(b), 17 A.R.S. Montgomery's second motion was filed on December 8, 2004, nearly four months after the verdicts were returned. Accordingly, the trial court lacked jurisdiction to consider the motion on its merits. We therefore do not revisit the substantive issues Montgomery raised in that motion and on appeal.

¶6 Montgomery has not argued that the trial court erred in denying his first motion for a new trial on the grounds raised in that motion. He has therefore abandoned any such claim. *See State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987).

Sentencing Issues

¶7 Montgomery contends, and the state concedes, the trial court erred in ordering that he serve his 10.5-year sentence for kidnapping "day for day," with no eligibility for any early or conditional release from confinement. Both parties correctly point out that A.R.S.

§ 13-604(I), the statute the court applied, in fact, provides that a defendant sentenced under that provision may be eligible for early release pursuant to A.R.S. § 41-1604.07.

¶8 On cross-appeal, the state contends, and Montgomery concedes, the trial court also erred in apparently believing that it lacked authority to sentence Montgomery on the kidnapping charge either as a repetitive, nondangerous offender under § 13-604(D) or as a dangerous, nonrepetitive offender under § 13-604(I). The court believed it could sentence Montgomery only under § 13-604(I), which provides a sentencing range of seven to twenty-one years, with a presumptive term of 10.5 years. The state had urged the court instead to sentence Montgomery under § 13-604(D), which provides a sentencing range of fourteen to twenty-eight years, with a presumptive term of 15.75 years.

¶9 We agree with the parties that the trial court committed these errors. Section 13-604(I) states, in relevant part, that "the defendant . . . shall not be eligible for . . . release from confinement on any basis . . . until . . . the person is eligible for release pursuant to § 41-1604.07." The trial court therefore should not have imposed a "day for day" sentence. In addition, as Montgomery concedes, the authorities the state cites support the proposition that the trial court could have sentenced him under either § 13-604(D) or § 13-604(I), notwithstanding the jury's finding that the kidnapping was a dangerous nature offense. *See State v. Laughter*, 128 Ariz. 264, 269, 625 P.2d 327, 332 (App. 1980) (rejecting argument that sentencing scheme intended "absurd result" that defendant's use of deadly weapon assured lesser sentence by requiring defendant to be sentenced as first offender of dangerous

offense and precluding sentence as repeat offender); *accord State v. Knorr*, 186 Ariz. 300, 306, 921 P.2d 703, 708 (App. 1996); *State v. Smith*, 171 Ariz. 54, 56, 828 P.2d 778, 780 (App. 1992). Accordingly, although the trial court imposed a sentence under subsection (I) that was within its discretion to impose, the sentence was not the product of the court's proper exercise of discretion. Having resulted instead from the court's misapprehension that it had no other choice, the sentence was an abuse of discretion.

¶10 For the foregoing reasons, we vacate the sentence on the kidnapping conviction and remand the matter for resentencing on that conviction. Montgomery's convictions and his other sentences are affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge